

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes and regulations involved	2
Statement	2
Specification of errors to be urged	5
Reasons for granting the writ	6
Conclusion	11
Appendix	12

CITATIONS

CASES:

<i>Goldsmith v. Commissioner</i> , 143 F. 2d 466, certiorari denied, 323 U.S. 774	11
<i>Rohmer v. Commissioner</i> , 153 F. 2d 61, certiorari denied, 328 U.S. 862	5, 6, 7, 8, 9, 10
<i>Sabatini v. Commissioner</i> , 98 F. 2d 753	9

STATUTES:

Internal Revenue Code:

Sec. 119 (26 U.S.C. 1940 ed., Sec. 119)	15
Sec. 143 (26 U.S.C. 1940 ed., Sec. 143)	10, 15
Sec. 211 (26 U.S.C. 1940 ed., Sec. 211)	7, 15, 16
Sec. 212 (26 U.S.C. 1940 ed., Sec. 212)	15
Revenue Act of 1938, c. 289, 52 Stat. 447:	
Sec. 119	12
Sec. 143	10, 12
Sec. 211	4, 7, 13
Sec. 212	15

MISCELLANEOUS:

T.D. 5011, 1940-2 Cum. Bull. 15	20
T.D. 5086, 1941-2 Cum. Bull. 38	20
Treasury Regulations 101:	
Art. 119-5	16
Art. 143-2	16
Art. 143-3	18
Art. 211-7	18
Treasury Regulations 103:	
Sec. 19.119-5	20
Sec. 19.143-2	20
Sec. 19.143-3	20
Sec. 19.211-7	20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No.

COMMISSIONER OF INTERNAL REVENUE, *Petitioner*,

v.

PELHAM G. WODEHOUSE

**PÉTITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fourth Circuit entered in this case.

OPINIONS BELOW

The opinion of the Tax Court (R. 14-28) is reported at 8.T.C. 637 and the opinion of the Circuit

Court of Appeals (R. 90-98) is reported at 166 F. 2d 986.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 16, 1948. (R. 98-99.) The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether payments made by publishers in the taxable years 1938 and 1941 for the serial rights in the United States and Canada, and in one instance for the book rights, to taxpayer's literary works constitute taxable gross income within the meaning of Section 211(a)(1) of the Revenue Act of 1938 and of the Internal Revenue Code.

STATUTES AND REGULATIONS INVOLVED

The applicable statutes and Treasury Regulations are set forth in the Appendix, *infra*, pp. 12-20.

STATEMENT

The facts found by the Tax Court material to the question presented are as follows:

The taxpayer is a British subject who formerly resided in France. During the taxable years 1938 and 1941 he was a nonresident alien. As a prolific and well known writer of serials, plays, short stories, and other literary works, he has a wide reputation in the United States, and his works were

accepted and published by various magazines. He sold his writings in the United States through literary agents. (R. 15-16.)

On February 22, 1938, the Curtis Publishing Company (hereinafter referred to as "Curtis") accepted for publication in the Saturday Evening Post an unpublished novel entitled "The Cow-Creamer" (or "The Silver Cow"), submitted to it by taxpayer's agent, and sent its check for \$40,000 to the agent on that date. (R. 18.) The memorandum of acceptance provided in part as follows (R. 18-19):

This check is offered and accepted with the understanding that The Curtis Publishing Company buys all rights in and of all stories and special articles appearing in its publications and with the further understanding that every number of these publications in which any portion thereof shall appear shall be copyrighted at its expense. After publication in a Curtis periodical is completed it agrees to reassign to the author on demand all rights, except American (including Canadian and South American) serial rights.

The book publication rights to "The Cow-Creamer" were sold for \$5,000 to another publisher, Doubleday, Doran and Company. (R. 19.)

On December 13, 1938, Curtis accepted taxpayer's novel "Uncle Fred in the Springtime", subject to the same agreement of reassignment of rights as was contained in its acceptance of "The

Cow-Creamer", and paid \$40,000 therefor. Both novels were published serially by Curtis during 1939. (R. 19-20.)

On July 23, 1941, taxpayer's agent sold to Hearst's International-Cosmopolitan Magazine for \$2,000 all the American and Canadian serial rights to an article entitled "My Years Behind Barbed Wire", written by taxpayer. (R. 27.)

On August 12, 1941, taxpayer's agent sold to Curtis for \$40,000 all the North American (including Canadian) serial rights to "Money in the Bank", a novel written by taxpayer.¹ (R. 25.)

On these facts the Tax Court held that the \$85,000 paid by Curtis and Doubleday, Doran and Company in 1938 for serial and book rights, respectively, to taxpayer's novels and the \$42,000 paid by Curtis and Hearst's Magazine in 1941 for serial rights to taxpayer's writings represented advance royalties and that, as such, they were "other fixed or determinable annual or periodical gains" within the meaning of Section 211(a)(1) of the Revenue Act of 1938 and of the Internal Revenue Code, with the result that they constitute taxable gross income of taxpayer as a nonresident alien in those years.² (R. 26.)

¹ Curtis' letter transmitting its check contained the same arrangement for reassignment of all rights except serial rights as in the case of "The Cow-Creamer". (R. 81-82.)

² The Tax Court also decided that the anticipatory assignments by taxpayer to his wife of a one-half interest in the two novels "The Cow-Creamer" and "Uncle Fred in the

On appeal the Circuit Court of Appeals for the Fourth Circuit reversed the decision of the Tax Court. The reversal was based on two grounds—(1) that the lump sum payments constituted the proceeds from sales of personal property and (2) that the payments were not in any event covered by Section 211(a)(1), because they were not “annual or periodical.” Judge Dobie dissented, stating that he thought the decision of the Tax Court should be affirmed on the authority and reasoning of *Rohmer v. Commissioner*, 153 F. 2d 61 (C.C.A. 2d), certiorari denied, 328 U.S. 862. (R. 90-98.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the payments made by publishers to taxpayer's United States literary agent in the taxable years were and are to be treated as the proceeds from the sale of personal property

“Springtime” were not the result of a real donative intent and lacked reality; that the royalties paid to taxpayer's wife in 1938 under these assignments were income of taxpayer; and that the statute of limitations did not bar the assessment of an additional tax for 1938. (R. 21-23.) Finally, it held that no part of the royalties paid in 1938 and 1941 by the publishers constituted income from sources outside the United States so as to be excludable from taxpayer's gross income in those years. (R. 23, 26-27.) These subsidiary holdings of the Tax Court were not passed upon by the Circuit Court of Appeals, because of its decision on the main issue that none of the payments by publishers in 1938 and 1941 were taxable income to taxpayer. Accordingly, these subsidiary questions are not presented in this petition for certiorari.

and in failing to hold that the payments were and should be treated as advance royalties.

2. In holding that the payments were not "other fixed or determinable annual or periodical gains" within the meaning of Section 211(a)(1) of the Revenue Act of 1938 and of the Internal Revenue Code.

REASONS FOR GRANTING THE WRIT

1. The decision of the Circuit Court of Appeals in this case is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Rohmer v. Commissioner*, 153 F. 2d 61, certiorari denied, 328 U.S. 862. Both cases involved the question whether a non-resident alien author is taxable on lump sums paid by a United States publisher to the author's United States literary agent for limited rights to one or more stories written by the author, the other rights in the stories being retained by the author.³ The answer de-

³ There was a slight difference in the form in which the transactions in the two cases were cast. In the *Rohmer* case an endorsement on the checks submitted in payment specified what rights were conferred on the publisher, which included the serial rights [meaning the right to magazine and newspaper publication in serial form] and the authority to copy-right, and stated that there was to be no prior publication anywhere in the world except by special written agreement and no book publication before magazine publication was completed. See R. 13, *Rohmer v. Commissioner*, No. 1151, October Term, 1945. In the present case lump sum payments for the serial rights were made under a memorandum of acceptance which provided as follows (R. 18-19):

depends upon whether such lump sum payments are advance royalties and whether, as such, they constitute "other fixed or determinable annual or periodical gains, profits, and income" within the meaning of Section 211(a)(1) of the Internal Revenue Code and the corresponding provision of the Revenue Act of 1938 (Appendix, *infra*, pp. 13-14) which requires non-resident aliens to pay income tax on amounts received "as interest * * *, dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income." In both the *Rohmer* case and the instant case the taxpayers argued that (1) the lump sum payments were received as the proceeds from the sale of personal property and thus were not taxable for that reason and that (2) the payments, even if advance royalties, were not in any event covered by the statute because they were paid in lump sums rather than annually.

This check is offered and accepted with the understanding that The Curtis Publishing Company buys all rights in and of all stories and special articles appearing in its publications and with the further understanding that every number of these publications in which any portion thereof shall appear shall be copyrighted at its expense. After publication in a Curtis periodical is completed it agrees to reassign to the author on demand all rights, except American (including Canadian and South American) serial rights.

The Circuit Court of Appeals for the Fourth Circuit did not, however, attempt to distinguish the *Rohmer* case on the basis of this difference in the form of the transactions involved.

or periodically. In the *Rohmer* case the Circuit Court of Appeals for the Second Circuit stated that it could not agree that the payments were the proceeds from the sale of personal property rather than advance royalties (153 F. 2d at p. 63), whereas in the present case the Circuit Court of Appeals for the Fourth Circuit held that the payments did constitute the proceeds from the sale of personal property (R. 93-95). In answer to the second contention of the taxpayers in the two cases, the Circuit Court of Appeals for the Second Circuit held in the *Rohmer* case that the phrase "other fixed or determinable annual or periodical gains, profits, and income" is "descriptive of the nature or type of income, regardless of the actual manner of payment" and covers advance royalties (153 F. 2d at p. 63), whereas the Circuit Court of Appeals for the Fourth Circuit in the instant case flatly rejected the Second Circuit's interpretation of the statutory language (R. 96-97) and held that the payments did not answer the statutory description of "annual or periodical" gains (R. 95-96), the theory of the court below apparently being that the statute covers only payments which are actually paid, or perhaps those which accrue, annually or periodically.⁴ The conflict in the two de-

⁴ While the court below rejected the interpretation of the statute adopted by the Second Circuit in the *Rohmer* case, it is not entirely clear what interpretation the court below would substitute for the Second Circuit's interpretation. On the one hand the opinion below appears to hold that the language

cisions is direct and clear-cut, as the court below recognized by its statement (R: 92) that it was unable to adopt the conclusions reached in the *Rohmer* case.

2. The decision below raises an important question which should be settled by this Court. Previously it had appeared to be sufficiently established that lump sum payments for the grant of limited rights, such as movie or serial rights, in a literary work of a non-resident alien were to be treated as advance royalties (See *Sabatini v. Commissioner*, 98 F. 2d 753 (C.C.A. 2d); *Rohmer v. Commissioner*, *supra*) and in both the *Rohmer* case and the present case the tax on the lump sum

"other fixed or determinable annual or periodical gains, profits, and income" covers only amounts which are actually paid annually or periodically (see R. 95-96) but, on the other hand, the court states as follows in a footnote (R. 97):

It is not meant to say that a lump sum payment is never subject to taxation under the statute. For example, it was held in *Commissioner v. Raphael*, 9 Cir., 133 F. 2d 442 [certiorari denied, 320 U. S. 735], that interest on a judgment which was paid in a lump sum was taxable under the section because the gain involved was periodical but such a ruling can have no bearing upon a single payment which is in no way related to the period in which the right is exercised or to the contingency of subsequent performance.

This, together with the statement that "The section does not tax all payments or all royalties but only those which are 'fixed or determinable annual or periodical'" (R. 96), suggests that the court below interpreted the statute as taxing only royalties which are based on a percentage of sales or

payments was withheld and paid by the author's United States agent pursuant to Section 143(b) of the Internal Revenue Code or of the Revenue Act of 1938 (Appendix, *infra*, pp. 12-13), both of which require the deduction and withholding of tax on the identical income upon which Section 211(a)(1) imposes a tax. The decision below, holding that such lump sum payments are not to be treated as advance royalties and are not taxable, introduces confusion in respect of the coverage of both the taxing and withholding section and, because identical language is used in the two sections, affects withholding agents in all jurisdictions of the country. The confusion is increased

profits, etc., that is, those royalties which are earned or accrue annually or periodically.

It will be noted that both of the two possible interpretations adopted by the court below are repugnant to the plain language of the statute. Since amounts paid as interest, dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, and emoluments are specifically covered, the phrase "or other fixed or determinable annual or periodical gains, profits, and income" must relate to income of the same type, not to the manner of payment. And, since some of the designated categories of income, such as compensations, remunerations and emoluments, are not only susceptible of lump sum payment but are not necessarily earned and do not necessarily accrue annually or periodically, the only logical interpretation of the statute is that it taxes all types of income which are fixed or determinable and are usually, but not necessarily, paid annually or periodically. Such an interpretation is consistent with the legislative history of the statutory language and with the pertinent decisions, as we showed in our Brief in Opposition in the *Rohmer* case, No. 1151, October Term, 1945.

by the failure of the court below to interpret the taxing section affirmatively, as distinguished from negatively. On the one hand, the decision holds that lump sum payments for the grant of limited rights in a literary work of a non-resident alien are exempt from tax as constituting the proceeds of a sale and, on the other hand, implies that periodic payments for the grant of the same limited rights might constitute royalties and be taxable. Further, the decision, by reason of its ultimate holding, also would confer upon non-resident aliens a tax advantage not enjoyed by authors who are citizens of the United States, the income from the writings of citizen authors engaged in the business of writing being subject to tax as ordinary income rather than as capital gain from the sale of property (*Goldsmith v. Commissioner*, 143 F. 2d 466 (C.C.A. 2d), certiorari denied, 323 U.S. 774). It is therefore important that this Court resolve the confusion resulting from the decision below and at the same time determine whether Congress intended to confer upon non-resident aliens the tax advantage and convenient means of tax avoidance reflected by the result reached below.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

June, 1948.

APPENDIX

Revenue Act of 1938, c. 289, 52 Stat. 447:

SEC. 119. INCOME FROM SOURCES WITHIN UNITED STATES.

(a) *Gross Income from Sources in United States.*—The following items of gross income shall be treated as income from sources within the United States:

* * * *

(4) *Rentals and royalties.*—Rentals or royalties from property located in the United States or from any interest in such property, including rentals or royalties for the use of or for the privilege of using in the United States, patents, copyrights, secret processes and formulas, goodwill, trade-marks, trade brands, franchises, and other like property; and

(5) *Sale of real property.*—Gains, profits, and income from the sale of real property located in the United States.

(6) *Sale of personal property.*—For gains, profits, and income from the sale of personal property, see subsection (e).

* * * *

SEC. 143. WITHHOLDING OF TAX AT SOURCE.

* * * *

(b) *Nonresident Aliens.*—All persons, in whatever capacity acting, including lessees or mortgagors of real or personal property, fiduciaries, employers, and all officers and employees of the United States, having the con-

trol, receipt, custody, disposal, or payment of interest (except interest on deposits with persons carrying on the banking business paid to persons not engaged in business in the United States and not having an office or place of business therein), dividends, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income (but only to the extent that any of the above items constitutes gross income from sources within the United States), of any nonresident alien individual, or of any partnership not engaged in trade or business within the United States and not having any office or place of business therein and composed in whole or in part of nonresident aliens, shall (except in the cases provided for in ~~sub~~ section (a) of this section and except as otherwise provided in regulations prescribed by the Commissioner under section 215) deduct and withhold from such annual or periodical gains, profits, and income a tax equal to 10 per centum thereof, except that such rate shall be reduced, in the case of a nonresident alien individual a resident of a contiguous country, to such rate (not less than 5 per centum) as may be provided by treaty with such country:

* * * * *

SEC. 211. TAX ON NONRESIDENT ALIEN INDIVIDUALS.

(a) *No United States Business or Office.*—

(1) *General Rule.*—There shall be levied, collected, and paid for each taxable year, in

lieu of the tax imposed by sections 11 and 12, upon the amount received, by every nonresident alien individual not engaged in trade or business within the United States and not having an office or place of business therein, from sources within the United States as interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income, a tax of 10 per centum of such amount, except that such rate shall be reduced, in the case of a resident of a contiguous country, to such rate (not less than 5 per centum) as may be provided by treaty with such country. For inclusion in computation of tax of amount specified in shareholder's consent, see section 28.

(2) *Aggregate more than \$21,600.*—The tax imposed by paragraph (1) shall not apply to any individual if the aggregate amount received during the taxable year from the sources therein specified is more than \$21,600.

* * * * *

(c) *No United States Business or Office and Gross Income of More Than \$21,600.*—A nonresident alien individual, not engaged in trade or business within the United States and not having an office or place of business therein who has a gross income for any taxable year of more than \$21,600 from the sources specified in subsection (a)(1), shall be taxable

without regard to the provisions of subsection (a)(1), except that—

(1) The gross income shall include only income from the sources specified in subsection (a)(1);

(3) The aggregate of the normal tax and surtax under sections 11 and 12 shall, in no case, be less than 10 per centum of the gross income from the sources specified in subsection (a)(1); and

SEC. 212. GROSS INCOME.

(a) *General Rule.*—In the case of a non-resident alien individual gross income includes only the gross income from sources within the United States.

The corresponding sections of the Internal Revenue Code, which control the year 1941, are substantially the same, with the exceptions that the rate of withholding applicable to 1941, as specified in Section 143(b) of the Code, as amended by Section 5 of the Revenue Act of 1940, c. 419, 54 Stat. 516, and by Section 107 of the Revenue Act of 1941; c. 412, 55 Stat. 687, was 15% until September 29, 1941, and 27½% after that date; that the rate of tax on income of nonresident alien individuals received in 1941 specified in Section 211(a)(1) of the Code, as amended by Section 105 of the Revenue Act of 1941, *supra*, was 27½%, that the ag-

gregate amount of income specified in Section 211 (a) (2) and (c) of the Code, as amended by Section 105, Revenue Act of 1941, *supra*, was \$23,000 for the year 1941; and that the percentage figure in Section 211(c) (3) of the Code, as amended by Section 105(c) of the Revenue Act of 1941, *supra*, applicable to 1941 was 27½%.

Treasury Regulations 101, promulgated under the Revenue Act of 1938:

ART. 119-5. *Rentals and royalties.*—Gross income from sources within the United States includes rentals or royalties from property located within the United States or from any interest in such property, including rentals or royalties for the use of or the privilege of using in the United States, patents, copyrights, secret processes and formulas, good will, trade-marks, trade brands, franchises, and other like property. The income arising from the rental of property, whether tangible or intangible, located within the United States, or from the use of property, whether tangible or intangible, within the United States, is from sources within the United States.

* * * * *

ART. 143-2. *Fixed or determinable annual or periodical income.*—Only fixed or determinable annual or periodical income is subject to withholding. The Act specifically includes in such income, interest, dividends, rent, salaries, wages, premiums, annuities, compensations, remunerations and emolu-

ments. But other kinds of income are included, as, for instance, royalties.

Income is fixed when it is to be paid in amounts definitely predetermined. Income is determinable whenever there is a basis of calculation by which the amount to be paid may be ascertained. The income need not be paid annually if it is paid periodically; that is to say, from time to time, whether or not at regular intervals. That the length of time during which the payments are to be made may be increased or diminished in accordance with someone's will or with the happening of an event does not make the payments any the less determinable or periodical. A salesman working by the month for a commission on sales which is paid or credited monthly receives determinable periodical income. The share of the income of an estate or trust from sources within the United States which is distributable, whether distributed or not, or which has been paid or credited during the taxable year to a nonresident alien beneficiary of such estate or trust constitutes fixed or determinable annual or periodical income within the meaning of section 143(b). The income derived from the sale in the United States of property, whether real or personal, is not fixed or determinable annual or periodical income. Such items as taxes, interest on mortgages, or premiums on insurance paid to or for the account of a nonresident alien landlord by a tenant, pursuant to the terms of the lease, constitute fixed or determinable annual or periodical income.

ART. 143-3. *Exemption from withholding.*— * * *

* * * *

The following items of fixed or determinable annual or periodical income from sources within the United States received by a citizen of France residing in France, or a corporation organized under the laws of France, are not subject to the withholding provisions of the Revenue Act of 1938, since such income is exempt from Federal income tax under the provisions of the tax convention between the United States and France, signed April 27, 1932, and effective January 1, 1936 (see page 680 of the Appendix to these regulations):

(1) Amounts paid as consideration for the right to use patents, secret processes and formulas, trade-marks, and other analogous rights;

(2) Income received as copyright royalties; and

* * * *

ART. 211-7. *Taxation of nonresident alien individuals.*—For the purposes of this article and articles 212-1, 213-1, 214-1, and 217-2, nonresident alien individuals are divided into three classes: (1) nonresident alien individuals not engaged in trade or business within the United States and not having an office or place of business therein at any time during the taxable year, and deriving in the taxable year not more than \$21,600 gross amount of fixed or determinable annual or periodical in-

come from sources within the United States; (2) nonresident alien individuals not engaged in trade or business within the United States and not having an office or place of business therein at any time during the taxable year and deriving in the taxable year more than \$21,600 gross amount of fixed or determinable annual or periodical income from sources within the United States; and (3) nonresident alien individuals who at any time during the taxable year are engaged in trade or business in the United States or have an office or place of business therein.

(a) *No United States business or office—*

General rule.—A nonresident alien individual within class (1) referred to in the preceding paragraph is liable to the tax upon the amount received from sources within the United States, determined under the provisions of section 119, which is fixed or determinable annual or periodical gains, profits, and income.

For the purposes of section 211 (a), the term "amount received" means "gross income."

Specific items of fixed or determinable annual or periodical income are enumerated in the Act as interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wages, premiums, annuities, compensation, remunerations and emoluments but other fixed or determinable annual or periodical gains, profits, and income are also subject to the tax, as, for instance, royalties. As to the determination of fixed or determinable annual or periodical income, see

article 143-2. The items of fixed or determinable annual or periodical income from sources within the United States received by a citizen of France residing in France which are exempt from Federal income taxation under the provisions of the tax convention between the United States and France signed April 27, 1932, and effective January 1, 1936 (see page 680 of the Appendix to these regulations), are described in article 143-3.

* * * * *

Sections 19.119-5, 19.143-2, 19.143-3 and 19.211-7 of Treasury Regulations 103, promulgated under the Internal Revenue Code, are substantially the same as the above. T.D. 5011, 1940-2 Cum. Bull. 15, and T. D. 5086, 1941-2 Cum. Bull. 38, conformed Regulations 103 to the provisions of the Revenue Acts of 1940 and 1941, *supra*, in respect of the withholding rates, rate of tax on gross income, and aggregate gross income, applicable to 1941.